

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CoxCom, Inc. d/b/a Cox Communications)	CSR 8385-E
Oklahoma City and Cox Communications Tulsa)	CSR 8386-E
)	
Petitions for Determination of Effective)	
Competition in Eight Oklahoma Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 2011

Released: June 30, 2011

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. CoxCom, Inc. d/b/a Cox Communications Oklahoma City and Cox Communications Tulsa, hereinafter referred to as “Cox” or “Petitioner,” has filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2), and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A (the “Attachment A Communities”). Petitioner alleges that its cable systems serving the Attachment A Communities are subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and are therefore exempt from cable rate regulation in the Attachment A Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”) and DISH Network (“DISH”). Petitioner also claims to be exempt from cable rate regulation in the Community listed on Attachment B (the “Attachment B Community”) because the Petitioner serves fewer than 30 percent of the households in that franchise area. Petitioner also claims that its cable systems serving the Communities listed on Attachment C (the “Attachment C Communities”) are subject to effective competition, pursuant to Section 623(l)(1)(D) of the Communications Act³ and Section 76.905(b)(4) of the Commission’s rules,⁴ because of the competing service provided by Southwestern Bell Telephone Company d/b/a AT&T Oklahoma, hereinafter referred to as “AT&T” or “Competitor.” The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ See 47 U.S.C. § 543(l)(1)(D).

⁴ 47 C.F.R. § 76.905(b)(4).

⁵ 47 C.F.R. § 76.906.

⁶ See 47 U.S.C. § 543; 47 C.F.R. § 76.905.

within the relevant franchise area.⁷ For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments A, B and C.⁸

II. DISCUSSION

A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁹ This test is referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.¹⁰ It is undisputed that the Attachment A Communities are “served by” both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.¹¹ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹² We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in the Attachment A Communities are reasonably aware that they may purchase the service of these MVPD providers.¹³ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹⁴ and is supported in the petitions with copies of channel lineups for both DIRECTV and DISH.¹⁵ Also undisputed is Petitioner’s assertion that both DIRECTV and DISH offer service to at least “50 percent” of the households in the Attachment A Communities because of their national satellite footprint.¹⁶ Accordingly, we find that the first prong of the competing provider test is satisfied.

⁷ See 47 C.F.R. §§ 76.906-907(b).

⁸ Although identical, two petitions (CSR 8385-E and CSR 8386-E) were filed in this case because some of the communities with different CUID numbers are on separate Cox cable systems and required the filing of a separate petition with a separate filing fee. CSR 8385-E includes Claremore (OK0112), Tulsa (OK0061) and Verdigris (OK0782) on PSID #003338. CSR 8386-E includes Bethany (OK0170), Nichols Hills (OK0171), The Village (OK0181), Tinker AFB (OK0172) and Warr Acres (OK0094) on PSID #001320.

⁹ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

¹⁰ 47 C.F.R. § 76.905(b)(2)(i).

¹¹ *See* Petitions at 15-16.

¹² *Mediacom Illinois LLC*, 21 FCC Red 1175, 1176, ¶ 3 (2006).

¹³ 47 C.F.R. § 76.905(e)(2).

¹⁴ *See* 47 C.F.R. § 76.905(g). *See also* Petitions at 14.

¹⁵ *See* Petitions at 14, Exhibit 9.

¹⁶ *See* Petitions at 13.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Attachment A Communities.¹⁷ Petitioner sought to determine the competing provider penetration there by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Attachment A Communities on a five digit zip code basis.¹⁸

6. The Petitioner then obtained occupied housing (household) data for each of the Attachment A Communities. For Tulsa, the Petitioner obtained official 2000 Census household data.¹⁹ For Claremore, where Petitioner states that the 2000 Census data appeared to be unreliable,²⁰ Petitioner relied upon its own business records and surveys of its franchise areas to determine the number of households.²¹ Petitioner states that it is appropriate to rely on its internally maintained business records as a starting point for the calculation of households in Claremore because Cox's cable system passes virtually one hundred percent of the homes in Claremore.²² Moreover, Cox asserts that it regularly updates these figures based on street-level surveys and data regarding the construction of new housing units.²³ In order to correctly determine the correct number of households in Claremore, Cox accounted for vacant homes by reducing its homes-passed data by applying the 2000 Census vacancy rate for that franchise area.²⁴ For Petitioner's franchise area in the Tinker Air Force Base, Petitioner states that it

¹⁷ *Id.* at 18.

¹⁸ Petitions at 18-20. Cox states that it has used a five-digit zip code allocation formula previously used by the Commission in a number of other decisions to calculate the DBS providers' subscribership in various Communities. *See, e.g., Comcast of Dallas, L.P.*, 20 FCC Rcd 17968, 17969-70 (2005) (approving of a cable operator's use of a Media Business Corporation "allocation factor, which reflects the portion of a five digit postal zip code that lies within the border of the City," to determine DBS subscribership for that franchise).

¹⁹ Petition at 18.

²⁰ Cox states that the 2000 Census data appeared unreliable in Claremore because the total current MVPD households exceeded the 2000 households. Cox asserts that this discrepancy is a result of rapid growth in Claremore since the 2000 Census. *See* Petition, n.72.

²¹ Petition at 19. Petitioner asserts that the Commission previously has approved of this methodology. *See Americable International Arizona, Inc.*, 11 FCC Rcd 11588 at ¶¶ 12 and 16 (1996); *see also, e.g., CoxCom, Inc.*, 22 FCC Rcd 4663, 4665 at ¶ 7 (2007); *CoxCom, Inc.*, 22 FCC Rcd 4522, 4526 at ¶ 13 (2007); *Cable TV Del Noroeste*, 13 FCC Rcd 12512 at ¶¶ 8 and 11 (1998).

²² Petition at 19.

²³ *Id.* Petitioner states that it uses a combination of data reported from various sources and system drive-outs to maintain an accurate count of the homes passed in its franchise areas. Further, Petitioner notes that all of the internally maintained records and information included in the Petition were current as of October 2010. *See* Petition, Declaration of Leon Pfeifer, Director of Governmental Affairs for CoxCom, Inc. d/b/a Cox Communications Oklahoma City and Cox Communications Tulsa (December 17, 2010).

²⁴ Petition at 19, n.75 and Exhibits 8 and 13. Accordingly to Cox, its cable system serving Claremore passes all the 8,991 households in that franchise area. Cox notes that the 2000 Census vacancy rate for Claremore is 7.4%. Cox calculates therefore that 92.6% of the homes its system passes in Claremore are occupied ($100 - 7.4 = 92.6$), which Cox asserts leaves 8,325.67 current households. *Id.* We note that while Cox's table in its Petition meant to reflect the aggregate penetration rate of competing providers in Claremore is 43.78%, it also listed the households in Claremore on that table as 8,373.82 instead of 8,325.67 as noted in the Petition at n.75 and in Exhibit 13. It also listed on that table the number DBS subscribers as 3,904.27 as opposed to 3,644.75 as listed in Exhibit 13. *See* Petition, table at 21. If the numbers used in Cox's table were to be used, the penetration rate for Claremore would be 46.62%. In order to achieve the penetration rate of 43.78% as noted in the table and in Exhibit 13, we used the numbers listed in Exhibit 13. We hold this administrative error to be harmless.

obtained current household data directly from the base's Housing Asset Manager.²⁵

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data for Tulsa and other data as described above for Claremore and Tinker Air Force Base,²⁶ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Attachment A Communities.²⁷ Therefore, the second prong of the competing provider test is satisfied for each of the Attachment A Communities.

8. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

B. Low Penetration Test

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area. This test is referred to as the "low penetration" test.²⁸ Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in Verdigris or the Attachment B Community.

10. Cox states that it serves only a small portion of Verdigris.²⁹ In order to determine the number of households in Cox's Verdigris franchise area, Cox relied on its own business records.³⁰ Cox further states that because Verdigris was not included in the 2000 Census, no 2000 Census vacancy rate for the city is available.³¹ Instead, Cox used the vacancy rate for Rogers County where Verdigris is located.³²

11. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in Verdigris. Therefore, the low penetration test is

²⁵ Petition at 19, n.76 and Exhibit 12. Cox submits the Email of Lowell D. Bynum, Housing Asset Manager, Tinker Air Force Base to Leon Pfeifer, Director of Government Affairs for CoxCom, Inc. d/b/a Cox Communications Oklahoma and Cox Communications Tulsa (July 16, 2010). The Email states that Tinker Air Force Base contains 660 homes with a 98% occupancy rate. See Exhibit 12. Accordingly, Cox reduced the households on the base by 2% so the number of households used by Cox in its calculations is 646.80.

²⁶ Petitions at 21 and Exhibit 13. See also n.23.

²⁷ Cox states that it also requested subscriber data from AT&T pursuant to 47 C.F.R. § 76.907(c), but AT&T refused to provide this information. See Petition at 20, n.81 and Exhibit 5. In this case, regardless of the lack of information provided by AT&T, competing provider effective competition has been established for Tulsa, Claremore, and Tinker Air Force Base by demonstrating that the number of households subscribing to the programming services of DIRECTV and DISH exceeds 15% of the households in the franchise areas.

²⁸ 47 U.S.C. § 543(l)(1)(A).

²⁹ Petition at n.83 and Exhibit 14.

³⁰ Petition at n.83. Cox states that it used the same methodology that it used to determine the number of households in Claremore under the competing provider test. See *supra* ¶ 6.

³¹ Petition at n.83.

³² *Id.* Cox explains that it applied the 6.4% vacancy rate for Rogers County to the count of 25 homes passed in the Verdigris service area in order to determine that Cox's service area contained approximately 23.40 occupied homes. See Exhibit 8.

satisfied as to the Attachment B Community.

C. The LEC Test

12. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition if a local exchange carrier (“LEC”), or its affiliate, offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services offered in that area are comparable to the video programming services provided by the competing unaffiliated cable operator.³³ This test is referred to as the “LEC” test.

13. The Commission has stated that the incumbent cable operator must show that the LEC intends to build out its cable system within a reasonable period of time if it has not completed its build out; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.³⁴ It is undisputed that the Attachment C Communities of Bethany, Claremore, Nichols Hills, The Village, Tulsa, and Warr Acres are served by both Petitioner and Competitor, a local exchange carrier, and that these two MVPD providers are unaffiliated. The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming³⁵ and is supported in the petitions with copies of channel lineups for Competitor.³⁶ Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Attachment C Communities, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.³⁷

14. Based on the foregoing, we conclude that Petitioner has also submitted sufficient evidence demonstrating that its cable system serving the Communities listed on Attachment C has met the LEC test and is subject to effective competition.

³³ See 47 U.S.C. § 543(l)(1)(D).

³⁴ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-15 (1999) (“*Cable Reform Order*”).

³⁵ See 47 C.F.R. § 76.905(g). See also Petitions at 12.

³⁶ See Petitions at Exhibit 7.

³⁷ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. See also Petitions at 4-12. In addition to refusing to provide Cox with information regarding AT&T’s subscribership (*supra* n.27), AT&T also refused to provide maps of its service area. See Petition at n. 38 and Exhibit 5. AT&T, however, did confirm that it served the Attachment C or LEC communities of Bethany, Claremore, Nichols Hills, Tulsa, and Warr Acres. See Petition at Exhibit 5. While AT&T’s initial response failed to disclose that it provided its U-verse service to The Village, AT&T later confirmed that it served that franchise area. See Email from Katherine Swaller, General Attorney, AT&T Oklahoma to Gary Lutzker, Counsel for Cox (Nov. 8, 2010) (attached as part of Exhibit 5). Cox also independently was able to confirm that U-verse service is available to customers in the Village. See, e.g., AT&T Service Availability Confirmation, The Village, Oklahoma, also included in Exhibit 5. Cox also submitted maps that it created demonstrating the minimum potential reach of U-verse service based on known locations of the Video Ready Access Devices (“VRADs”) AT&T uses to deliver its U-verse service as of August, 2010. See Petition at Exhibit 4.

III. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Cox Com, Inc. d/b/a Cox Communications Oklahoma City and Cox Communications Tulsa **ARE GRANTED**.

16. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the Communities set forth on Attachments A, B and C **ARE REVOKED**.

17. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division, Media Bureau

³⁸ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8385-E and CSR 8386-E

COMMUNITIES SERVED BY COXCOM, INC. d/b/a COX COMMUNICATIONS OKLAHOMA CITY AND COX COMMUNICATIONS TULSA

Communities	CUIDs	CPR*	Occupied Households	Estimated DBS Subscribers
Claremore	OK0112	43.78%	8,325.67	3,644.75
Tinker Air Force Base	OK0172	16.95%	646.80	109.62
Tulsa	OK0061	16.81%	165,743	27,865.27

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B**CSR 8385-E****COMMUNITIES SERVED BY COXCOM, INC. d/b/a COX COMMUNICATIONS OKLAHOMA
CITY AND COX COMMUNICATIONS TULSA**

Community	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Verdigris	OK0782	23.40	5	21.37%

ATTACHMENT C**CSR 8385-E and CSR 8386-E****COMMUNITIES SERVED BY COXCOM, INC. d/b/a COX COMMUNICATIONS OKLAHOMA
CITY AND COX COMMUNICATIONS TULSA**

Communities	CUIDs
Bethany	OK0170
Claremore	OK0112
Nichols Hills	OK0171
The Village	OK0181
Tulsa	OK0061
Warr Acres	OK0094